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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-6694

CHARLES R. KNOWLES, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 15, 1981

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FOR THE TENTH CIRCUIT

The Petitioner, CHARLES R. KNOWLES, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 26, 1981.

OPINION BELOW

The Opinion of the Court of Appeals, for routine publication, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit was entered on March 26, 1981. This petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and this Court's Rule 20.1.

QUESTIONS PRESENTED

1. Does prejudice to the Defendant as the basis for declaring a mistrial control with regard to double jeopardy, negate a weighing of burdens to the Defendant.

2. Is the Defendant entitled to have a motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure determined where a combination of bases for severance is present.

3. Whether there is proper identification of stolen goods shipped in interstate transportation to warrant a conviction beyond reasonable doubt under 18 U.S.C. Section 2314.

4. Whether a motion and comprehensive memorandum in opposition to withdrawal of a plea agreement reveals a factual dispute on the issue of breach, wherein the Trial Court should have held further hearing to resolve any dispute.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 18:

> Section 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.
>
> Whoever transports in interstate or foreign

commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or. . .

Federal Rules of Criminal Procedure
Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked upon a federal indictment charging violation under one count of 18 U.S.C. Section 1962(c); one count of violation of 18 U.S.C. Section 1962(d); and 16 counts of violation of 18 U.S.C. Section 2314 and 2. After trial to jury, judgment of conviction was entered on all counts on December 1, 1978. Defendant was sentenced to eight years imprisonment and a $10,000.00 fine on the substantive racketeering conviction under 18 U.S.C. 1962(c) with concurrent terms of imprisonment being imposed on the remainder of the convictions. Appeals from these convictions and sentences followed.

A first jury trial under the subject indictment against the Defendant and Co-Defendants began on October 18, 1978. On October 24, 1978, Mr. Facer, a prosecution witness, was cross-examined by Mr. Leedy, counsel for Co-Defendant Al Marchini in reference to Mr. Facer's lying under oath to a Federal grand jury (Supp. A, TR. 5). Mr. Leedy then sought an admission that Mr. Facer had lied on prior occasions. Mr. Facer testified that he had appealed a state

criminal conviction, the appeal having been filed by Mr. Leedy, and Mr. Facer having filed a pauper's oath on the appeal (Supp. A, TR. 6). Mr. Facer further testified concerning his requesting the state to pay for the appeal because of his indigent status (Supp. A, TR. 6). Mr. Leedy then attempted to impeach Mr. Facer with his prior testimony to a California grand jury that Mr. Facer had owned real estate at the time of the filing of the pauper's oath (Supp. A, TR. 8-9). Mr. Leedy then questioned Mr. Facer concerning a state judicial inquiry held on the issue of Mr. Facer's indigency (Supp. A, TR. 9).

The Court halted the questioning stating:

> "It seems unseemly to me that counsel who was responsible for this questioning is now representing another client attacking his credibility." (Supp. A, TR. 10).

Thereupon, Mr. Leedy offered to cease his cross-examination (Supp. A, TR. 11).

Co-Defendant Charles Calabrese's counsel then suggested he cross-examine the witness (Supp. A, TR. 11). The Court viewed the situation as it would "bring disrespect upon the lawyers and upon the Court" and also concluded: "That's my observation and consequently cannot be permitted." (Supp. A, TR. 13). Charles Calabrese's counsel argued that if Mr. Facer had lied to Mr. Leedy about the facts set forth in the pauper's oath, such communication would not come within the attorney-client privilege, about the Court's obligation to prevent unseemly controversies being opened up in the courtroom (Supp. A, TR. 15).

Government counsel proposed that the crucial attorney-client relationship before the Court was that of Mr. Leedy and Co-Defendant Al Marchini, and that if the Co-Defendant

desired to continue to be represented by Mr. Leedy, after knowledge of a possible conflict of interest, then the trial could proceed with Mr. Leedy as counsel (Supp. A, TR. 21-22). The Court rejected this position because the Court did not approve of Mr. Leedy's making a closing argument for the Co-Defendant wherein Mr. Leedy would be attacking the credibility of a former client (Supp. A, TR. 22-23). The Government also suggested that Mr. Facer be cross-examined on the issue by other defense counsel who could argue the possible issue of credibility on closing summation. The Court rejected this suggestion (Supp. A, TR. 24-25).

The Court then stated the solution of:

> ". . .on the court's motion to sever out Mr. Marchini. . .on the court's motion to mistrial and start over." (Supp. A, TR. 25-26)

The Court then raised the thought that it might be more "economical to have a mistrial without going through the rest of the time and having to repeat." (Supp. A, TR. 26-27) The Government protested that even if Co-Defendant Al Marchini were "severed out", the problem would still be there with respect to Mr. Leedy, and Co-Defendant Al Marchini could be required to obtain new counsel (Supp. A, TR. 27-28). Further argument by the Government related to the effect of the problem on the jury that it was not at a level that would warrant severance or mistrial. The Court responded that the problem had "arisen in the mind of the court." (Supp. A, TR. 27) The Court never returned to the issue of effect on the jury.

The Court considered the possibility of a short continuance of two weeks while Co-Defendant Al Marchini retained substitute counsel, but the Court put aside that suggestion when Mr. Barker, on behalf of the Defendant Charles R. Knowles,

stated he believed he would be required to call Mr. Leedy as a witness (Supp. A, TR. 30-32). The Court then stated that ". . .it's my judgment that we declare a mistrial." (Supp. A, TR. 32-33). At the conclusion of the proceedings, upon inquiry of counsel for Co-Defendant Samuel Calabrese, the Court reiterated that it had ordered the mistrial sua sponte taking into consideration previous motions for mistrial (Supp. A, TR. 42). A motion for dismissal of the indictment on double jeopardy grounds was timely made (I TR. 147).

Pre-trial and trial motions to sever to accord the Defendant Charles R. Knowles a separate trial were filed and denied by the Trial Court (I TR. 45, 79; IX TR. 1506, 1507). Testimony revealed that Co-Defendant Samuel Calabrese who had no criminal convictions prior to 1976, was convicted in 1976 under 18 U.S.C. Section 2314 and Section 1962(d) (XI TR. 2168). That Co-Defendant Charles Calabrese, without the knowledge of the Defendant, had made a threatening type of statement to a third party, the statement being ". . .the desert is full of a lot of dead bodies." (V TR. 440). Further evidence indicated the Calabreses' dealings in Nevada and California with regard to underpricing of merchandise and connections with a convicted felon, without the knowledge of the Defendant (VII TR. 1081-1086, 1138-1151, 1249-1250).

The Defendant brought out a party's interest in the Pleasant Grove business in September of 1975 (IV TR. 146). In replacing the other party in the Pleasant Grove business, the Defendant paid for the party's interest in lumber (IV TR. 141). An additional $30,000.00 worth of lumber was added to Pleasant Grove's inventory by the Defendant in October or November of 1975 (IV TR. 146). Other merchandise

was put into the inventory by the Defendant before May of 1976, the merchandise including tables, hardware, water tanks, wrought iron work, refrigerators, freezers, televisions and lawnmowers (IV TR. 149, 161, 163).

Invoices were prepared in conjunction with merchandise shipped between Pleasant Grove and Western Builders Supply (IV TR. 18-25; Supp. B, Ex. 20)

Witness Warnick testified that he prepared the invoices by keeping track of what was shipped on a separate piece of paper, transposed it to the invoice or simply prepared the invoice (IV TR. 94-95). Further testimony with regard to pricing of the shipped merchandise was given by Warnick as follows:

> "Q. Now, did you include a price on these invoices?
>
> "A. On these invoices I prepared on the 30th they are already priced out.
>
> "Q. And how did you arrive at the price.
>
> "A. I would take the bills we got from the suppliers, take the prices off there, extend the amounts and then add 10% charge." (IV TR. 95).

Only some stolen merchandise reflected on invoices or transmitted by drivers was specifically identified. (TR. 382, 384, 411, 1251)

Preceding the trial, a written plea agreement was entered into by the Defendant and the Government, wherein, among other matters, Counts One through Nineteen would be dismissed (II TR. 195). The Government abruptly withdrew the agreement (I TR. 32). The Defendant filed a motion to vacate and/or correct sentence. The motion was based upon a lack of an evidentiary hearing having been held on the Government's obligations under the agreement. Accompany-

ing the motion was a copy of the agreement and a memorandum in support thereof (II TR. 193, 195, 197). The Trial Court entered an Order denying the motion, the order stating in part:

> "The court believes the burden of establishing a breach of the agreement is on defendant. The Government has, in any event, introduced a sworn statement that Knowles refused to cooperate with the Government and to plead guilty to any count. In view of the showing and the complete absence of evidentiary support for defendant's assertion that the government breached the agreement, the court has no choice but to deny defendant's motion." (II TR. 230-231).

The Government had filed a declaration of noncompliance (II TR. 215).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW APPEARS TO CONFLICT WITH THIS COURT'S DECISION ON DOUBLE JEOPARDY IN ARIZONA V. WASHINGTON

Double jeopardy has been considered in the light of the Manifest Necessity Doctrine since United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824), and amplified in Arizona v. Washington, 434 U.S. 497, 503, 503 L.Ed2d 717, 98 S.Ct. 824 (1978). Further resolution of the application of Arizona should be tendered to the Court of Appeals.

In this case, the Tenth Circuit upheld the Manifest Necessity basis for declaring a mistrial on the premise that bias or prejudice to the Defendant would not be alleviated by considered alternatives. The prejudices to the Defendant were based upon the Tenth Circuit's contention of the Trial Court's being "confronted" with the ethical practices of another attorney other than the Defendant's. Appendix, p. 4

Where there was no fault for any problems that arose in the Trial Court's mind by either the prosectuion or the Defendant herein, the burden noted in Arizona should have been taken into account. In Arizona v. Washington, supra at 503, 504, the Court, while giving a high degree of respect to the trial judge's evaluation of impartiality of jurors, noted that "even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden upon the accused, prolongs the period in which he is stigmatized by an unresolved accusatory wrongdoing and may even enhance the risk that an innocent Defendant may be convicted." These burdens were noted in Arizona where the facts showed

that the Defendant did indeed cause a basis for a mistrial.

The Tenth Circuit's attempt to dilute certain alternatives to a mistrial because of a seemingly existing bias to the Defendant, in effect usurped a real burden to the Defendant as this Court noted in Arizona. If the alternatives to mistrial are to be abandoned because of a supposed bias, a closer application of bias should be attempted in conjunction with the burden of retrial to the Defendant.

Additionally, where the Trial Court's consideration of the ethics of one attorney was at the base of a controversy (Supp. A, TR. 5, 9, 10) and in no way compounded by the Defendant herein, a bias should not have been correlated to this Defendant.

2. IN HOLDING THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSING TO SEVER THE DEFENDANTS, THE COURT OF APPEALS BELOW HAS RENDERED A DECISION OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In approaching the question of a fair trial for the Defendant through severance, the Tenth Circuit essentially separated but not combined, components of the basis for the severance. The Court of Appeals took note of three evidentiary factors propounded by Defendant that were prejudicial and thus grounds for severance. The three factors were Defendant Samuel Calabrese's disposition of merchandise, a threat to the driver and prior conviction of similar charges. Appendix, pg. 8. The Tenth Circuit declared that the first two factors would have been admitted against Defendant at a separate trial, with the third factor, prior conviction, not being a ground

for severance. Appendix, pg. 8.

While United States v. Balderrama, 566 F.2d 560, 569 (5th Cir., 1978) and United States v. Knowles 572 F.2d 267, 270 (10th Cir., 1978) held that prior convictions are not grounds for severance, neither Balderrama, Knowles nor again the Tenth Circuit in this case have taken into consideration a combination of the factors present here. The question of some prejudicial factors, even though properly used as conspiracy evidence, combining with nonconspiracy evidence, that being in this case prior conviction evidence, has not been raised in this Court.

Balderrama and Knowles have only dealt on a piecemeal basis with severance. The combination of factors for severance should be addressed and not really disected. Certiorari is proper and necessary to determine finally this question.

3. IN HOLDING SUFFICIENCY OF EVIDENCE AS TO SOURCE OF TRANSPORTED MERCHANDISE, THE COURT OF APPEALS BELOW RENDERED A DECISION WHICH CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS

The Eighth Circuit in Anderson v. United States, 406 F.2d 529 (8th Cir., 1969), delved into the basis for conviction under 18 U.S.C. Sec. 2314 in regard to elements that must be present, among which elements are that merchandise be transported in interstate commerce, having been stolen and having a value of $5,000.00 or more. The Eighth Circuit in Anderson particularly took note of the facts relating to the identification of shipment of stolen merchandise, upholding sufficiency where evidence of identification showed a witness identifying stolen

merchandise and specifically relating to it where produced.

The Tenth Circuit took into account evidence in the instant case of pricing of merchandise at the shipment site after witness stated he had received prices from defrauded suppliers, that some merchandise was purchased on credit from the defrauded suppliers for purpose of transmitting it to Nevada and further that two witnesses identified merchandise delivered to out of state outlets that came from defrauded creditors. Appendix, pgs. 9 and 10. This evidence does not meet the criteria in Anderson and Backun v. United States, 112 F.2d 635, 638 (4th Cir., 1940), in either explaining the source as the evidence revealed in the instant case that there was a commingling of prior nondefrauded assets, (IV TR. 141, 146, 149, 161, 163), or in identifying with particularity the stolen goods before or after shipment wherein the two witnesses did not specify amounts or quantities (TR. 411, 1251).

The commingling of the nondefrauded goods was not separated. The pricing the Court of Appeals alluded to and the fact of some merchandise being delivered out of state does not bring to the level of evidence the foundation for conviction under 18 U.S.C. 2314 as held in Anderson v. United States, supra, by the Eighth Circuit.

4. IN HOLDING THERE WAS A FAILURE TO PRODUCE PROPER EVIDENCE RAISING A FACTUAL DISPUTE ON A PLEA AGREEMENT ENFORCEABILITY, THE COURT OF APPEALS BELOW RENDERED A DECISION WHICH CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS

The Tenth Circuit's upholding of a certain portion of the Pre-Trial Agreement question conflicts with the Fifth

Circuit's decision in United States v. Cowen, 524 F.2d 504, 514 (5th Cir., 1975), wherein the trial court in that case did not accept the proper plea agreement giving the reason that the government's fair assertion of reasons for dismissal were unaccompanied by factual evidence. The Fifth Circuit stated:

> "We cannot agree that this motion lacks specificity of evidentiary proof. The representations in the motion and supporting memorandum were not merely conclusary. . .".

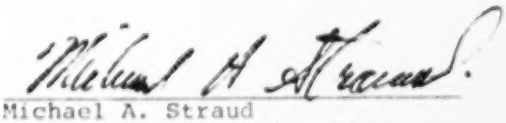
While the Tenth Circuit in this case remanded a portion of the Pre-Trial Agreement issued to the Trial Court to determine if the Defendant had an adequate opportunity to supplement his pleadings with an evidentiary affidavit (Appendix, pgs. 22, 23), this Court of Appeals is in opposition to the Fifth Circuit on the basis that where even if Defendant had an occasion to submit said evidentiary affidavit, what the Defendant in fact provided the Court was sufficient to have an evidentiary hearing. The Tenth Circuit's holding that there was a complete absence of evidentiary support from the Defendant even though there was a motion and comprehensive memorandum (Appendix, pg. 22), conflicts with Cowen, as Cowen does take into account representations in a motion and supporting memorandum.

The Tenth Circuit did recognize the error in the Trial Court's posturing on "burden of persuasion" (Appendix, pg. 22) but the Tenth Circuit's attempt to overturn this error by the Trial Court through assertion of no evidentiary support is not in compliance with Cowen and thus this conflict between the Circuits should be settled.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Tenth Circuit.

Respectfully submitted:



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May 15, 1981

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAR 26 1981
HOWARD K. PHILLIPS
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES ARMEN CALABRESE,
SAMUEL RAY CALABRESE,
CHARLES R. KNOWLES,

Defendants-Appellants

Nos. 79-1388
79-1390
79-1392

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D. C. No. CR-78-00087)

James N. Barber of Barber, Verhoef & Yocom, Salt Lake City, Utah, for Appellant Charles Armen Calabrese.

Oscar Goodman, Las Vegas, Nevada, for Appellant Samuel Ray Calabrese.

Michael Allen Straud, Aurora, Colorado, for Appellant Charles R. Knowles.

John Depue, Department of Justice, Washington, D. C. (with Ronald L. Rencher, United States Attorney, Salt Lake City, Utah, on the briefs) for Appellee United States of America.

Before McKAY, BREITENSTEIN and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

Facts

Defendants Samuel Calabrese, Charles Calabrese and Charles Knowles were convicted of sixteen counts of interstate transportation of stolen property (18 U.S.C. § 2314), one count of engaging in a pattern of racketeering activity (18 U.S.C. § 1962(c)), and one count of conspiring to participate in racketeering activity (18 U.S.C. § 1962(d)). The indictment charged that defendants used a Utah building supply company to obtain building materials on credit with no intention of paying for them. The merchandise was allegedly transported to Nevada and California and sold.

Double Jeopardy

Defendants' first trial ended in a declaration of mistrial. Counsel for a co-defendant who was eventually acquitted attempted to impeach a government witness by inquiring whether the witness had lied in a pauper's affidavit filed in an earlier criminal proceeding. The examination revealed that the attorney had represented the witness in the earlier proceeding and had prepared the affidavit he was using for impeachment.

The trial judge stopped the questioning and conducted a hearing outside the jury's presence. The judge expressed concern that an attorney's impeachment of a former client with information obtained in their professional relationship made the attorney both a witness and an advocate for his position, injured the attorney-client relationship, and would bring disrespect upon lawyers and the court.

After discussion of the courses available to cure the impropriety, counsel for Samuel Calabrese recommended mistrial as the only viable alternative. The attorneys for Knowles and Charles Calabrese joined in the motion, but the latter subsequently withdrew from it. The government opposed the motion. After further discussion of the alternatives, the judge agreed that a mistrial was necessary. Upon later inquiry by counsel, the judge explained that the mistrial "motion was granted sua sponte taking into consideration the previous motions for mistrial that were made." (Record, supp. vol. A, at 42).

Prior to the commencement of the second trial, defendants moved for dismissal of the indictment on double jeopardy grounds. The court denied the motions, reminding counsel that their motions had prompted the mistrial declaration and finding, in any event, that the mistrial had been warranted by manifest necessity.

A defendant may not be retried after a declaration of mistrial unless the defendant requested or consented to the mistrial or unless there was "manifest necessity" for the mistrial. Arizona v. Washington, 434 U.S. 497, 505 (1978); United States v. Dinitz, 424 U.S. 600, 607-08 (1976) (quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824)). Because we find that there was manifest necessity for the mistrial declaration, we need not decide whether any defendant was barred from objecting to reprosecution by requesting or consenting to the mistrial.

We note first that the mistrial declaration was not caused by prosecutorial or judicial overreaching. Cf. United States v. Scott, 437 U.S. 82, 94 (1978); United States v. Dinitz, 424 U.S. 600, 611 (1976). The impropriety was introduced by a defense attorney, and the government strenuously opposed the mistrial motion.

The words "manifest necessity" "do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." Arizona v. Washington, 434 U.S. 497, 506 (1978) (footnote omitted). The court below was confronted with a kaleidoscope of problems, including a possible violation of the attorney-client privilege, the attorney's role as both an advocate and a witness in the proceedings, and a controversy over the ethical propriety of the attorney's prior representation of the witness. The testimony placed the attorney's ethics in issue because he had prepared the allegedly false pauper's affidavit. The exchange was prejudicial to all defendants because the jury would tend to associate this attorney and his client with co-counsel and their clients. Counsel for Samuel Calabrese and Knowles told the court they felt obligated to call the attorney as a witness on credibility. This would have deepened the conflict between the attorney's role as advocate and witness and would have exacerbated the controversy over the attorney's ethics.

The record reveals that before declaring the mistrial the court considered a number of less drastic alternatives, including severing the trial of the defendant whose attorney had caused the

impropriety, permitting him to obtain new counsel, and restricting the scope of cross-examination insofar as it related to disclosure of privileged communications. However, the court was not required to accept a solution which remedied only one of the problems or offered only temporary relief. A severance or substitution of counsel would not have removed the ethical issues raised in the jurors' minds or eliminate the other defendants' interest in impeaching the witness through use of the pauper's affidavit. Limiting the scope of cross-examination would have provided only limited relief, since counsel for two defendants indicated they would be obligated to call the attorney as a witness on the credibility issue. These or other remedial measures would not have necessarily removed the risk of bias created by the questions raised about the attorney's ethics. "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected ...." Arizona v. Washington, 434 U.S. 497, 511 (1978). Therefore we sustain the trial court's finding that there was "manifest necessity" for a declaration of mistrial.

Motion for Change of Venue

Prior to trial, Charles Calabrese unsuccessfully moved for change of venue from the District of Utah to the District of Nevada on the grounds that he, another defendant, and witnesses they intended to call resided in Nevada, that the cost of transporting and housing the witnesses would constitute an undue burden, and that the character witnesses enjoyed reputations for integrity in Las

Vegas and therefore would be more persuasive to a jury in Las Vegas.

Fed. R. Crim. P. 21(b) permits a court upon motion to transfer a proceeding to another district "[f]or the convenience of parties and witnesses, and in the interest of justice." The decision whether to grant a motion for change of venue rests largely in the sound discretion of the trial judge. United States v. Jobe, 487 F.2d 268, 269-70 (10th Cir. 1973), cert. denied, 416 U.S. 955 (1974); Wheeler v. United States, 382 F.2d 998, 1001-02 (10th Cir. 1967).

While the factors cited would support the granting of the motion, when weighed in context they do not compel that result. The business enterprise that was alleged to be the front for perpetration of the fraudulent scheme was located in Utah. Eight of the government's witnesses resided in Utah, and the offices of most of the victimized building supply firms were in Utah. Utah was "the location of events likely to be in issue," as well as "the location of documents and records likely to be involved." Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 244 (1964). The trial judge did not abuse his discretion in denying the motion for change of venue.

Severance

Samuel Calabrese and Knowles claim that the trial judge abused his discretion by denying their motions for severance.

Contrary to Calabrese's contention, his defense was not directly antagonistic to Knowles' defense, and severance was not required. Knowles, who managed the business in Utah, testified that his inability to pay creditors was caused by the bank's refusal to honor checks written by Samuel Calabrese, who received the merchandise in Nevada. Calabrese's defense was not inconsistent with this testimony. Calabrese testified that he had stopped payment on certain checks because he had received insufficient merchandise to warrant the payment or because he intended to substitute checks for smaller amounts to facilitate collection. Both defendants testified that other payments were completed. Both defendants sought to demonstrate that they lacked the requisite intent to defraud. Neither accused the other of criminal culpability or of possessing the intent to defraud. Therefore, it was not the case that the defenses were irreconcilable, or that "'the jury [would] unjustifiably infer that this conflict alone demonstrates that both are guilty.'" United States v. Becker, 585 F.2d 703, 707 (4th Cir. 1978) (quoting United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977)), cert. denied, 439 U.S. 1080 (1979). One defendant's attempt to cast blame on the other is not in itself a sufficient reason to require separate trials. United States v. Ready, 574 F.2d 1009, 1015 (10th Cir. 1978).

Samuel Calabrese complains that the joint trial prejudiced him by necessitating his taking the stand to rebut Knowles' testimony and thus exposing him to the revelation of his former convictions. Severance would not have alleviated this problem, however, since

Knowles' testimony concerning the dishonored checks was a repetition of the testimony of government witnesses, particularly the building supply company's president.

Calabrese also contends that separate trials would have avoided the impropriety leading to the mistrial declaration. While this may be true, we cannot by hindsight find an error on this basis. A rule requiring separate trials whenever the unexpected conduct of one attorney or defendant might prejudice another would preclude the use of joint trials altogether, a result unsupported by authority. While that and other risks which typically attend joint trial should always be present in the mind of the trial court when considering severance motions, the fact that the impropriety ultimately occurs does not, standing alone, render the court's advance decision an abuse of discretion.

Knowles argues that a severance was required because the evidence of Samuel Calabrese's disposal of the merchandise, threat to a driver, and prior convictions of similar charges made it impossible for Knowles to receive a fair trial. However, since Samuel Calabrese's efforts to dispose of the merchandise and his threat were part of the conspiracy alleged in the indictment, evidence of them would have been admissible against Knowles in a separate trial. The unsavory reputation and prior convictions of co-defendants are not grounds for severance. United States v. Knowles, 572 F.2d 267, 270 (10th Cir. 1978); United States v. Baldarrama, 566 F.2d 560, 569 (5th Cir.), cert. denied, 437 U.S. 906 and 439 U.S. 844 (1978). We believe that this evidence did not sufficiently

prejudice Knowles so as to deny him the right to a fair trial.

"To establish abuse of discretion more is required than that separate trials might have offered a better chance for acquittal of one or more of the accused." United States v. Knowles, 572 F.2d 267, 270 (10th Cir. 1978). The district court did not abuse its discretion in refusing to grant the severance motions made by Samuel Calabrese and Knowles.

Sufficiency of the Evidence

Conviction of defendants under 18 U.S.C. § 2314 requires the government to prove beyond a reasonable doubt that defendants (1) transported in interstate commerce (2) stolen goods (3) worth $5,000 or more, (4) knowing at the time of the transportation that the goods were stolen. Anderson v. United States, 406 F.2d 529, 531 (8th Cir. 1969). Defendants challenge the sufficiency of the evidence as to some of these elements. In reviewing the jury's verdicts, we must view the evidence in the light most favorable to the government and determine whether a reasonable juror could be convinced beyond a reasonable doubt of each defendant's guilt as charged. See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Johnson, 589 F.2d 716, 720 (D.C. Cir. 1978). An examination of the evidence under this standard reveals that it was sufficient to support the verdicts.

Knowles argues that the evidence failed to establish the source of the transported merchandise and thus failed to prove it was stolen. However, the evidence showed that the building supply

company purchased merchandise on credit from the defrauded suppliers for the purpose of transmitting it to the Calabrese brothers in Nevada. Also, the company president testified that his practice was to list the prices for the merchandise on the invoices and send the priced invoices to the Calabrese brothers after he received the wholesale prices from the defrauded suppliers. This testimony indicates that the shipped merchandise came from the defrauded suppliers. Lastly, two witnesses testified that merchandise delivered to the out-of-state outlets came from one of the defrauded creditors.

Knowles and Samuel Calabrese contend that the government failed to prove that the truckloads of transported building materials each had a value of $5,000 or more. However, the invoices provided ample proof that each truckload contained stolen goods worth at least $5,000. See United States v. Jones, 421 F.2d 841, 842 (4th Cir. 1970).

Knowles challenges the sufficiency of proof of the mens rea element. We believe, however, that the evidence on this issue was sufficient. The evidence showed that Knowles made numerous misrepresentations concerning the destination of the merchandise and the ultimate recipient's solvency. He told a witness that the company president would "stay up front and take the heat" that might result from Knowles' dealings through the building supply company. (Record, vol. 5, at 473). When the company president told Knowles that a creditor believed "that there is a rip off going on and that you are involved in it," Knowles responded, "I am." (Record, vol. 4, at 136).

Charles Calabrese challenges the sufficiency of the evidence as to all counts. The evidence showed that he set up the initial meeting between some of the conspirators. He ordered appliances from the Utah building supply company and assisted in receiving merchandise at the Nevada outlet. He attempted to sell merchandise below cost and made false representations about the source of goods. He also sought to deceive purchasers about the source of merchandise by directing a truck driver to remove the signs from a truck and by counseling the driver to tell purchasers that he didn't know where the goods came from. He threatened the driver that failure to cooperate would result in death.

Therefore, there was abundant circumstantial evidence that Charles Calabrese entered into the agreement and abundant direct evidence that he was one of the principal actors in the conspiracy. Since the evidence showed that the acts of interstate transportation were objectives of the conspiracy, defendant's conviction on each of the interstate transportation counts and on the count charging a pattern of racketeering activity were also clearly supported by the evidence. Pinkerton v. United States, 328 U.S. 640, 645-48 (1946).

Declarations of Co-conspirators

Charles Calabrese protests the admission into evidence of co-conspirators' declarations under Fed. R. Evid. 801(d)(2)(E).

In United States v. Andrews, 585 F.2d 961, 965 (10th Cir. 1978), we held that prior to admitting a co-conspirator's declaration under Fed. R. Evid. 801(d)(2)(E) the district court judge must

determine from independent evidence that it was more likely than not that a conspiracy existed, that defendant and the declarant were members of the conspiracy, and that the declaration was made during the course of and in the furtherance of the objects of the conspiracy. See United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979), cert. denied, 100 S.Ct. 2985 (1980). We also said that "[e]vidence of the acts and statements of other co-conspirators may be admitted prior to demonstrating participation in the conspiratorial scheme by the objecting defendant, providing the foundation is subsequently laid." United States v. Andrews, 585 F.2d at 966.

These procedures were followed here. The district court admitted the statements conditionally. At the close of the government's case, the court found that a preponderance of independent evidence demonstrated the conspiracy's existence and the defendants' membership in the conspiracy. Since the declarants were defendants, the court effectively found that the declarants were also members of the conspiracy. At the close of all the evidence, the district court repeated its finding that a preponderance of independent evidence showed the conspiracy's existence.

The record makes clear that the trial judge had Andrews in mind and understood his responsibility under the Andrews standards. Although he did not explicitly say that the statements were made during the course of and in furtherance of the conspiracy, the record clearly reveals that the statements satisfied this test. Under these circumstances, we cannot say that a reversible error was made.

Calabrese argues that the trial court must determine the conspiracy's existence prior to the admission of co-conspirators' statements. In United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979), cert. denied, 100 S.Ct. 2985 (1980), we adopted the procedures set forth in United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). The procedures provide

> that it is preferable, whenever possible, to require the Government to first introduce independent proof of the conspiracy and, subsequent thereto, to establish the connection of the defendant with the conspiracy before admitting hearsay declarations of co-conspirators. However, ... in certain instances where it is not "reasonably practicable to require the showing to be made before admitting the evidence, the court may admit the statements subject to being connected up."

United States v. Petersen, 611 F.2d at 1330 (quoting United States v. James, 590 F.2d at 582).

We do not wish to intimate that a district court may depart from the preferred order of proof without some substantial reason for doing so. However, we believe that the district court did not abuse its discretion in this case, particularly since the trial was held before the Petersen procedures were announced by this court.

Prior Misconduct

Knowles argues that evidence of other acts of misconduct was improperly admitted at trial. Fed. R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Knowles' defense was that he intended to operate a legitimate business, and that his inability to pay creditors was the result of Samuel Calabrese's failure to pay for goods promptly rather than the result of a fraudulent scheme. To support his defense, Knowles introduced testimony that he contributed lumber to the enterprise and lost this investment when the business collapsed. To rebut this defense, the government elicited testimony from a witness that Knowles told him he had obtained the lumber on credit and that the seller was attempting to reposses it. The witness testified that Knowles said, "My name is crime and crime doesn't pay. I have countersued [the seller] through my attorney." (Record, vol. 5, at 484).

These statements were relevant and admissible because they contradicted Knowles' claim, central to his defense, that he suffered a personal financial loss in the lumber company's demise. Evidence of other misconduct is admissible to show intent when, as here, intent is in issue. See 2 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 404[12] (1980). The government's evidence tended to rebut Knowles' claim that he was a victim of circumstances and did not intend to defraud the enterprise's creditors. See United States v. Jacobson, 578 F.2d 863, 866 (10th Cir.), cert. denied, 439 U.S. 932 (1978).

Testimony was also admitted concerning Knowles' alleged use of forged cashier's checks in an unrelated transaction. The trial court ordered that some of the testimony be stricken from the record, and we believe that the remaining portion of the testimony constituted harmless error.

Prior Conviction

The government sought to elicit from Knowles an admission that nine years before trial he was convicted of an offense. Knowles' response revealed that the conviction was beyond the ten-year period established by Fed. R. Evid. 609 for admissibility of prior conviction evidence. The trial judge sustained objections to the question and instructed the jury to disregard it. When considered in context, the procedures followed by the trial court were not an abuse of its discretion.

The Trial Court's Instructions to the Jury

Samuel Calabrese challenges certain of the trial judge's instructions to the jury. He contends that the jury should not have been instructed that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending on the evidence presented them." (Record, supp. vol. 5, at 36-37). Although this instruction has been expressly disapproved in this circuit, United States v. Pepe, 501 F.2d 1142, 1144 (10th Cir. 1974), it has been held not to be reversible error when there are repeated references to the reasonable doubt standard elsewhere in the instructions. Id. at 1143-44; United States v. Partin, 552 F.2d 621, 643 (5th Cir.), cert. denied, 434 U.S. 903 (1977). Here the instructions mentioned the reasonable doubt standard at least twenty-one times and the court explained that "[a] reasonable doubt exists whenever after careful and impartial consideration of all the evidence in the case the jurors do not feel convinced to a moral

certainty that a defendant is guilty of a charge."[1] (Record, supp. vol. 5, at 35). See United States v. Pepe, 501 F.2d at 1143-44. It must also be remembered that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Therefore, although we repeat our disapproval of this instruction, we hold that it was not reversible error in light of other instructions given by the trial court.

Relying on United States v. Stanfield, 521 F.2d 1122 (9th Cir. 1975), defendant challenges the court's instruction that "[y]our sole interest is to ascertain the truth from the evidence in this case." (Record, supp. vol. 5, at 38). In Stanfield the trial judge's unorthodox opening remarks may have left the jurors with the understanding that it was their duty "to decide the case only by determining which of the two sets of purported facts was true" without regard to the reasonable doubt standard. Id. at 1126. By contrast, the instruction here was simply an explanation that the jury's duty included resolving credibility issues, and did not create the impression that the jury's duty was merely to adopt one of two versions of the facts, regardless of the reasonable doubt standard.

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1. Contrary to defendant's contention, the "moral certainty" definition as employed in the circumstances here was at most curative, and not objectionable. See United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974); United States v. Smaldone, 485 F.2d 1333, 1348 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

Samuel Calabrese failed to raise at trial his other objections to the instructions. We have determined that the challenged instructions do not constitute plain or grave error amounting to the denial of a fundamental right. No other review is required. United States v. Harper, 579 F.2d 1235, 1239 (10th Cir.), cert. denied, 439 U.S. 968 (1978); Lowther v. United States, 455 F.2d 657, 664 (10th Cir.), cert. denied, 409 U.S. 857, 887 (1972).

Request for Written Instructions

Knowles contends that the trial judge improperly denied his request for written jury instructions. Giving the jury a copy of the instructions is desirable in complex cases, see United States v. Standard Oil Co., 316 F.2d 884, 896 (7th Cir. 1963), but the practice is within the sound discretion of the trial judge. Oertle v. United States, 370 F.2d 719, 729 (10th Cir. 1966), cert. denied, 387 U.S. 943 (1967); United States v. Conley, 503 F.2d 520, 522 (8th Cir. 1974). We find no abuse of that discretion here.

Multiplicity and Duplicity

Knowles argues that a number of the counts alleging interstate transportation of stolen property were multiplicitous and duplicitous, because in some instances the contents of several truckloads of stolen merchandise were recorded on a single invoice form, and in other instances two invoice forms were used to list the contents of a single truckload. The number of invoice forms used to record merchandise, however, is irrelevant. The graveman of a violation of 18 U.S.C. § 2314 is transportation of stolen goods in interstate commerce. Each act of interstate transportation involving goods of

the requisite jurisdictional amount is chargeable as a separate offense. See United States v. Gotches, 547 F.2d 80, 82 (8th Cir. 1977); United States v. Dilts, 501 F.2d 531, 534 (7th Cir. 1974); see also Badders v. United States, 240 U.S. 391, 394 (1916). Therefore, the counts were not multiplicitous or duplicitous.

Knowles' argument that grouping two invoices in a single count is an improper means of achieving the § 2314 jurisdictional amount is similarly flawed. It is of no consequence that the property in a single truckload was represented by more than one invoice.

Pattern of Racketeering Activity

Knowles argues that the interstate transportation of numerous truckloads of stolen building materials did not constitute a pattern of racketeering activity with the meaning of 18 U.S.C. § 1961(1), because the transactions were between the same parties and thus constituted "a single customer transaction." The clear language of the statute refutes this argument. Section 1961(1) defines "racketeering activity" as "(B) any act which is indictable under ... [18 U.S.C.] sections 2314 and 2315." Section 1961(5) defines a "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter, and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity." The government established the § 2314 offenses and proved they were committed within the statutory period and pursuant to a single, continuing enterprise. See United States v. Kaye, 556 F.d 855, 860-61 (7th Cir.), cert. denied, 434 U.S. 921 (1977). Thus the

government proved a pattern of racketeering activity.

Pretrial Agreement

Knowles contends that the government improperly withdrew from a pretrial agreement in which defendant agreed to plead guilty to the conspiracy count and testify truthfully in the grand jury and trial proceedings and the government agreed to dismiss the remaining counts at the sentencing stage. Before trial, the government advised Knowles' attorney by letter that it considered the agreement null and void because of Knowles' failure to abide by its provisions and that it intended to prosecute Knowles on all counts. The government filed a sealed copy of the letter with the trial court.

Defendant apparently did not object to this letter at the time. Neither did he plead guilty to any count or testify for the government. Following his prosecution and conviction on all counts, defendant moved to vacate the sentence, alleging that the government had breached the agreement and requesting a hearing.

The government's response included a sworn statement by a Department of Justice attorney attesting that after signing the agreement defendant refused to give any statement to the F.B.I. agent who repeatedly attempted to interview him and that defendant notified the agent that he would not cooperate in the investigation or testify at trial. The statement also attested that the attorney later met with defendant and told him that defendant had failed to abide by the plea agreement's terms, and that he must advise the attorney within one week whether he intended to plead guilty and

testify for the government. Defendant replied that he would talk to his counsel and notify the government attorney of his decision. However, the government attorney heard nothing thereafter from the defendant or his counsel regarding a guilty plea or testimony.

The government argued that defendant's conduct violated the agreement, and the government particularly pointed to language in the agreement providing that

> [t]he defendant, CHARLES R. KNOWLES, understands and agrees that if he wilfully fails to comply with any part of this agreement, or that if he fails to tell the complete and entire truth as to any material matter to agents or attorneys for the United States, or if he fails or refuses to testify truthfully as to any material matter in any Grand Jury or trial proceeding, this agreement is null and void, [and] all charges can and will be brought against him:...

(Record, Pleadings, vol. 2, at 215).

The district judge denied defendant's motion to vacate, specifying that he believed that defendant had the burden of proving a breach by the government, but that in any event the government had introduced a sworn statement alleging facts amounting to breach, and the defendant had produced no evidentiary support for his assertion of breach by the government.

Courts have frequently looked to contract law analogies in determining the rights of defendants aggrieved in the plea negotiation process. See Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir. 1979); Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Cal. L. Rev. 471, 530 (1978). It is clear that a defendant's failure to fulfill the terms of a pretrial

agreement relieves the government of its reciprocal obligations under the agreement. United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976); United States v. Resnick, 483 F.2d 354, 358 (5th Cir.), cert. denied, 414 U.S. 1008 (1973); United States v. Nathan, 476 F.2d 456, 459 (2d Cir.), cert. denied, 414 U.S. 823 (1973).

The analogy to contract law doctrines is not determinative in the area of plea negotitation, however. Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate "safeguards to insure the defendant what is reasonably due [in] the circumstances." Santobello v. New York, 404 U.S. 257, 262 (1971); see Cooper v. United States, 594 F.2d 12, 15-20 (4th Cir. 1979).

We believe that one requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement. The question of a defendant's breach is not an issue to be finally determined unilaterally by the government. United States v. Simmons, 537 F.2d 1260, 1261-62 (4th Cir. 1976). If the pleadings reveal a factual dispute on the issue of breach, the district court must hold a hearing to resolve the factual issues. If the pleadings reveal no disputed factual issues, no hearing is necessary and the court may determine the issue of breach as a matter of law.

We believe that constitutional principles of fairness also require that once the government acknowledges the existence of an agreement, the government has the burden of establishing a breach by

the defendant if the agreement is to be considered unenforceable.

In this case there was a judicial determination of breach. Although the trial judge incorrectly believed that the burden of persuasion was on defendant, he did not rest his decision on that belief, but rather weighed the government's sworn statement against the "complete absence of evidentiary support for defendant's assertion that the government breached the agreement." (Record, Pleadings, vol. 2, at 230-31). Since defendant failed to produce an affidavit or any other evidence raising a factual dispute,[2/] summary disposition of the issue was proper.

The above framework and analysis assume that defendant had an adequate opportunity to respond to the government's pleadings on the issue of breach. This assumption, however, is put at issue by the record. The defense attorney's reply to the government's sworn statement alleged that defendant had been transferred from the county jail to a federal facility and that defense counsel had not yet learned of defendant's whereabouts at the time of filing the reply. Therefore, we remand to the district court for a determination whether, between the filing of the government's sworn statement

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2. Defendant's attorney alleged in an unsworn pleading that the F.B.I. agent "harassed [defendant] in such a manner as to prevent cooperation." (Record, Pleadings, vol. 2, at 222). Were this allegation submitted in a sworn statement it arguably might have sufficiently disputed the government's sworn statement to warrant an evidentiary hearing on the issue of breach. However, we think that the trial judge could have properly concluded that defendant's subsequent conversation with the government attorney and his failure to contact the attorney, plead guilty, or testify constituted a breach of the agreement.

and the court's order, defendant had an adequate opportunity to supplement his pleadings with an affidavit or other documents disputing the facts alleged in the government's statement. If he did not, the trial court must allow defendant to file such documents and must then redetermine the issue of breach under the framework outlined above. If defendant's failure to file such documents before the motion was denied was caused by the fault of defendant or his counsel rather than by the government's exercise of control over defendant in transferring him to another facility, defendant will not be allowed to file such documents, and the trial court's order will be affirmed.

The judgments in Nos. 79-1388 (Charles Armen Calabrese) and 79-1390 (Samuel Ray Calabrese) are severally affirmed. In No. 79-1382 (Charles R. Knowles) the case is remanded for further proceedings in light of this opinion.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM- March 27, 1981

Before Honorable Monroe G. McKay, Honorable Jean S. Breitwnstein and Honorable James K. Logan, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	J U D G M E N T
	)	
vs.	)	No. 79-1392
	)	
CHARLES R. KNOWLES,	)	(D.C. No. CR 78-87)
	)	
Defendant-Appellant.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the ---------- District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this court.

Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

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